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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 478

WILLIAM G. STRATTON, CHARLES F. CARPENTIER, ELBERT S. SMITH, JOSEPH D. LOHMAN AND C. ARTHUR NEBEL, SUBSTITUTED FOR GRENVILLE BEARDSLEY, DECEASED,

Petitioners,

vs.

LAR (AMERICA FIRST) DALY,

Respondent.

PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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CHAMPLIN-SWEALY COMPANY, CHICAGO — 365

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THE OPINIONS BELOW, THE DATE OF THE JUDGMENT APPEALED FROM AND THE DATE THAT REHEARING WAS DENIED.

The opinion of the Court of Appeals for the Seventh Circuit is reported in 304 F. 2d at pages 666 to 668. It is reprinted in full as Appendix I to this Petition.

The district court's memorandum is not reported. It is reprinted in full as Appendix II to this Petition.

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 12, 1962. It is reprinted in full as Appendix III to the Petition.

Petition for rehearing was denied on July 5, 1962.

THE STATUTE CONFERRING THIS COURT'S JURISDICTION OVER THIS PETITION.

This Court's jurisdiction over this petition for *certiorari* is conferred by Title 28, Section 2101 of the United States Judicial Code, which authorizes this Court to grant *certiorari* to review judgments of United States Courts of Appeal on petitions filed within ninety days from the date of any such judgment.

THE QUESTIONS PRESENTED.

The questions presented are:

I. THE DISTRICT COURT DISMISSED THIS ACTION UNDER THE FEDERAL CIVIL RIGHTS ACT AGAINST ILLINOIS' FORMER GOVERNOR AND OTHER STATE OFFICERS COMPRISING ILLINOIS' STATE PRIMARY BOARD. IT LATER REINSTATED THIS SUIT UPON THE PLAINTIFF'S PETITION FOR SUCH REINSTATEMENT FILED MORE THAN TEN DAYS AFTER THE ENTRY OF THE ORDER OF DISMISSAL. THE DISTRICT COURT DENIED PETITIONERS' TIMELY MOTION TO VACATE THE ORDER OF REINSTATEMENT.

WERE THE ORDER OF REINSTATEMENT AND THE DENIAL OF PETITIONERS' TIMELY MOTION TO VACATE THAT ORDER "FINAL AND APPEALABLE"?

II. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN REINSTATING THIS CASE AND IN REFUSING TO VACATE ITS ORDER OF REINSTATEMENT?

RULES OF FEDERAL CIVIL PROCEDURE INVOLVED.

"Rule 55. Default.

"(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead

or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

"(b) Judgment. Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take or account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

"(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60 (b).

"Rule 59. New Trials; Amendment of Judgments.

"(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

"(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

"(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

"(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

"(e) Motion to alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

"Rule 60. Relief from Judgment or Order.

"(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be cor-

rected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

"(b) Mistakes; Inadvertences; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1), mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for new trial under Rule 59 (b); (3) (fraud whether heretofore denominated intrinsic or extrinsic) misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., sec. 1655, or to set aside a judgment for fraud upon the court. Writs of *coram nobis, coram vobis, audita querela,* and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

STATEMENT OF THE CASE.

On May 19, 1960, the plaintiff, Lar (America First) Daly (respondent here), filed this action at law for damages in the sum of $135,150.00 actual damages, and $5,000,000.00 exemplary damages against William G. Stratton, then the Governor of Illinois, Elbert S. Smith, then the State Auditor of Illinois, Joseph D. Lohman, the then State Treasurer of Illinois, and the late Grenville Beardsley, the then Attorney General of Illinois. He charged that those defendants, acting in their ex-officio capacities as Members of the State Primary Canvassing Board of Illinois, willfully and corruptly refused to approve the plaintiff's nominating papers and to certify him as a candidate for nomination by the Republican Party, for the office of United States Senator from Illinois at the November, 1960, election. (*Original Complaint*, Tr. 4 to 10.)

Plaintiff invoked the Federal Civil Rights Act (28 USC, Secs. 13331 and 13343).

The defendants filed a motion to dismiss this case for want of jurisdiction and for failure to state a case upon which relief could be granted and a brief in support of that motion. (App. 15 to 24.)

On **December 22, 1960,** while the defendants' motion to dismiss was pending and undisposed of, the district court entered the following order (App. 28):

> "This cause being called for report on status, and plaintiff failing to respond it is Ordered that the cause be and is hereby **dismissed for want of prosecution.**
>
> Robson, Judge."

On the same day, **December 22, 1960,** the docket contains the following matter (Doc. p. 1):

> "Mld. ntcs 12-23-60".

(This entry means "mailed notices December 23, 1960.")

On **January 20, 1961, which date was more than 10 days after the entry of the judgment of dismissal entered on December 22, 1960,** in fact, 28 days after the entry of that judgment, counsel first filed their appearance for plaintiff and filed their motion to vacate the order of dismissal, together with an affidavit of the plaintiff in support of that motion. (Tr. pp. 28 to 45.)

That motion is set forth in full in the printed transcript at pages 28 to 45. In salient particular, the plaintiff deposed:

> 3. **That he apparently was not very diligent in his efforts to watch the calendars of the six cases now pending in the Courts of Illinois** and not being a member of the bar he does not subscribe or have available to him regularly, a copy of the Daily Law Bulletin which lists the call of cases in this and other courts, and as a result he did not notice that this case was on call of the Honorable Edwin A. Robson until after it had been dismissed." (Emphasis supplied.)

The district court entered an order on June 6, 1961, vacating the judgment of dismissal. (Reprinted in full, Appendix II.)

On June 30, 1961, the district court entered an order denying the defendants' motion to vacate the order of reinstatement.

On November 8, 1961, the district court entered an order "that defendants' motion to vacate the court's order and judgment heretofore entered on June 6, setting aside its judgment of December 22, 1960, dismissing this case for want of prosecution and with prejudice be and it hereby is denied." (Tr. 131.)

The defendants took a timely appeal from this final order refusing the vacation of the order of reinstatement.

The Court of Appeals for the Seventh Circuit held that the order of reinstatement and the order denying vacation of that order were not "final", were not "appealable," and hence were not "reviewable."

Notwithstanding this holding, the Court of Appeals expressed its opinion that the district court did not abuse its discretion in reinstating this case and in refusing to vacate the order of reinstatement.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

I.

THIS CASE PRESENTS A SUBSTANTIAL AND IMPORTANT QUESTION OF FEDERAL PRACTICE THAT HAS NOT BEEN PRECISELY DECIDED BY THIS COURT ALTHOUGH THE OPINION OF THE COURT OF APPEALS IS DIRECTLY CONTRARY TO THIS COURT'S MOST NEARLY APPLICABLE DECISIONS.

Mindful that this court does not ordinarily grant *certiorari* unless the court below has decided a question of more than usual moment in the national jurisprudence, under this Point of this Petition we emphasize only the importance of the principal question presented.

Prior to the promulgation of the Federal Rules of Civil Procedure, this court consistently held, as did other Federal and State courts, that an order vacating a judgment or decree was not of itself final and appealable **if the motion for the vacation of the decree was made within the term at which the order or decree vacating it was entered.**

But this court also steadfastly held, as did other Federal and State courts, **that where an application to vacate a final judgment or decree was made at a subsequent term,** the application for vacation of the judgment or decree was so far in the nature of a new suit that an order vacating the judgment or decree was itself appealable even though the order left the merits of the litigation undisposed of. *Hume v. Bowie,* 148 U. S. 245, a p. 255; *Stevirmac Oil & Gas Co.* v. *Dittman,* 245 U. S. 210.

Save for the opinion of the Court of Appeals in this case, the consensus has been that Federal Rules of Civil Procedure No. 59, title "New Trial; Amendments of Judgments", which prescribes that motions for new trials to alter or amend the judgment just be served in less than 10 days after the entry of judgment, supplant the common law concept of "term time", so that where such motions are filed within 10 days (instead of the "term time" of common law and classic chancery practice), orders allowing those motions are not appealable and are not reviewable until the litigation is disposed of by a final order, but that motions for "Relief From Judgment or Order" under Rule 60 takes place of such new suits at law or chancery as proceedings for *coram nobis, audita querela,* bills to impeach, vacate or review a decree and that *where a motion to vacate a judgment is made more than 10 days after the entry of the judgment,* an order vacating the judgment **is "final and appealable" even though, unless reversed, it leaves the litigation wholly undisposed of on the merits.**

The question whether orders entered under Rule 60, that is, orders for "Relief from Judgment or Order", presented more than 10 days after the entry of the judgment from which relief is sought, are or are not appealable, is of such moment as to elicit this court's writ of *certiorari.*

II.

THE ORDER VACATING THE JUDGMENT OF DISMISSAL AND REINSTATING THIS CAUSE, HAVING BEEN ENTERED ON A MOTION MADE MORE THAN TEN DAYS AFTER THAT JUDGMENT WAS ENTERED, WAS FINAL AND APPEALABLE EVEN THOUGH IT DID NOT PURPORT TO ADJUDICATE THE SUBSTANTIVE MERITS OF THE PLAINTIFF'S CLAIM.

Nothing is better settled than the rule that if a motion to vacate a judgment or decree **is made within 10 days thereafter, from the entry of the judgment or decree,** an order vacating the judgment, with or without a new trial is not final and is not appealable. Such an order is indeed reviewable. But it is not reviewable until the final judgment has been entered and then only upon an appeal from the final judgment.

But it is equally clear that where the motion or petition to vacate a judgment is *not* made within 10 days from the date of its entry, the judgment has become "final" and the property rights that it adjudicates are vested save as they may have become divested by a collateral attack.

A subsequent order rendered upon such a collateral attack that vacates the prior *final* judgment so far divests or disturbs substantially vested rights that the mere order of vacation is itself "final" even though it does not dispose of the issues that were concluded by the previously final judgment until the time of its vacation.

Before considering a few of the leading cases signally declaring the rule, including Judge Learned Hand's superlative exposition of the rule in *Board of Supervisors* v. *Knickerbocker Ice Co.*, 80 F. (2d) 248, discussed below, it is well

to rehearse a few of the classical considerations from which the rule stated in the paragraph next above emerges:

At the common law and in chancery practice prior to statutory intervention or innovation by rules of court having the force of statutes, judgments in actions at law and decrees by courts of chancery were subject to vacation or modification upon the motion of any party or upon the court's action *sua sponte* at any time *during* the term at which the judgment was rendered or the decree was pronounced. All such judgments or orders were said to be *in pectore*, that is, "in the breast of the court." Of course an order vacating a judgment or setting aside a decree and making no final disposition of the issues was interlocutory, not final and therefore not appealable *if the order vacating the judgment or setting aside the decree was entered at the same term that the judgment or decree was rendered.*

But once the term of Court had passed, judgments or decrees could be assailed in the courts that entered them only by a new proceeding, original in character, which in actions at law such as writs of error *coram nobis* or proceedings by way of *audita querela* in actions at law or bills of review, bills in the nature of bills of review and bills to impeach decrees in courts of chancery.

Once the term of court at which a judgment or decree was rendered had passed, the rights under judgments or decrees had become so far "vested" that although they might indeed become "divested" in a limited number of proper cases, the mere order or judgment vacating such a judgment at a "past term" was itself final even though it left the parties where they stood before the decree attacked had been vacated.[1]

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1. In Hughes Federal Procedure, it is said:

Sec. 19372. Effect of Expiration of Term—Prior Rule.

But the Court was careful to say at page 848:

"While it is true that cases may be found which hold that an order vacating (or refusing to vacate) a judgment or decree is appealable [*Sterirmac Oil & Gas Co.* v. *Dittman*, 245 U. S. 210, 38 S. Ct. 116, 62 L. Ed. 248; *Zadig* v. *Aetna Ins. Co.*, 42 F. (2d) 142 (C.C.A. 2); *Phillips* v. *Negley*, 117 U. S. 665, 6 S. Ct. 901, 29 L. Ed.

Prior to the promulgation of Federal Rule 6, it was well settled that, in general, when a final judgment or decree had been entered and the term of court had expired, the court lost all control over the judgment or decree unless during the term steps had been taken, by motion or otherwise, to remedy the error complained of. The rule, a rigid one, was subject to the conceded exception that even after the term had expired and even though no motion had been made during the term, the court always had power to correct clerical errors or mistakes or mere formal defects in the judgment or decree.

The Supreme Court has stated the general rule and its exceptions as follows: "In the absence of statute providing otherwise, the general principle obtains that a court cannot set aside or alter its final judgment after the expiration of the term at which it was entered, unless the proceeding for that purpose was begun during that term. *Hudson* v. *Guestier*, 7 Cranch. 1; *Cameron* v. *McRoberts*, 3 Wheat. 591; *Ex parte Sibbald*, 12 Pet. 488, 492; *Bank of United States* v. *Moss*, 6 How. 31, 38; *Bronson* v. *Schulten*, 104 U. S. 410, 415-417; *Phillips* v. *Negley*, 117 U. S. 665, 673, 674; *Hickman* v. *Fort Scott*, 141 U. S. 415; *Hume* v. *Bowie*, 148 U. S. 245, 255; *Tubman* v. *B. & O. R. R. Co.*, 190 U. S. 38; *Wetmore* v. *Karrick*, 203 U. S. 141, 149-152; *In re Metropolitan Trust Co.*, 218 U. S. 312, 320, 321.

But there have always been certain exceptions.

In the case of courts of common law—and we are not here concerned with the special grounds upon which courts of equity afford relief—the court at a subsequent term has power to correct inaccuracies in mere matters of form, or clerical errors, and, in civil cases, to rectify such mistakes of fact as were reviewable on writs of error *coram nobis*, or *coram vobis*, for which the proceeding by motion is the modern substitute. *Pickett's Heirs* v. *Legerwood*, 7 Pet. 144, 148; *Matheson's Admr.* v. *Grant's Admr.*, 2 How. 263, 281; *Bank of United States* v. *Moss*, *supra*; *Bronson* v. *Schulten*, *supra*; *Phillips* v. *Negley*, *supra*; *In re Wright*, 134 U. S. 136; *Wetmore* v. *Karrick*, *supra*.

1013; *Hume* v. *Bowie*, 148 U. S. 245, 13 S. Ct. 582, 37 L. Ed. 438], an examination of the facts of each case discloses a situation *where the order appealed from vacated a previous decree or judgment at a term subsequent to the one at which it was entered, and when the court had lost jurisdiction of the cause. In these in-*

These writs were available to bring before the court that pronounced the judgment errors in matters of fact which had not been put in issue or passed upon and were material to the validity and regularity of the legal proceeding itself; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict or interlocutory judgment,—for, it was said, *'error in fact is not the error of the judges and reversing it is not reversing their own judgment.'*

So, if there were error in the process, or through the default of the clerks, the same proceeding might be had to procure a reversal. But if the error were 'in the judgment itself, and not in the process,' a writ of error did not lie in the same court upon the judgment, but only in another and superior court. Tidd, 9th ed., 1136, 1137; Stephen on Pleading, 119; 1 Roll. Abr. 746, 747, 749. In criminal cases, however, error would lie in the King's Bench whether the error was in fact or law. Tidd. 1137; 3 Bac. Abr. (Bouv. ed.) "Error," 366; Chitty, Crim. L. 156, 749. See *United States* v. *Plumer*, 3 Cliff. 28, 59, 60. The errors of law which were thus subject to examination were only those disclosed by the record, and as the record was so drawn up that it did not show errors in the reception or rejection of evidence, or misdirections by the judge, the remedy applied 'only to that very small number of legal questions' which concerned 'the regularity of the proceedings themselves.' See Report, Royal Commission on Criminal Code (1879), p. 37; 1 Stephen, Hist. Crim. L. 309, 310." *U. S.* v. *Mayer*, 235 U. S. 55 (1914).

The Supreme Court has also said:

"It is a general rule of law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the Term at which they are rendered or entered of record, and they may then be set aside, vacated, modified or annulled by the court.

"But it is a rule equally well established, that after the Term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that Term,

stances, the motion to vacate and the order granting the same are treated as a new and independent suit, and the final order granting the same is held to be appealable." (Emphasis supplied.)

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by motion or otherwise, to set aside, modify or correct them, and if errors exist they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that *while realizing that there is no court which can review its decisions*, it has *invariably refused all applications for rehearing made after the adjournment of the court for the Term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court. Brooks* v. *R. R. Co.*, 102 U. S. 107; *Public Schools* v. *Walker*, 9 Wall. 603; *Brown* v. *Aspden*, 14 How. 25; *Cameron* v. *McRoberts*, 3 Wheat. 591; *Ex parte Sibbald* v. *United States*, 12 Pet. 488; *U. S. Glamorgan*, 2 Curtis, 236; *Bradford* v. *Patterson*, 1 A. K. Marsh., 464; *Ballard* v. *Davis*, 3 J. J. Marsh, 656. (Emphasis supplied.)

* * * * * *

"The question relates to the *power* of the courts and not to the mode of procedure. It is, whether there exists in the court the authority to set aside, vacate, and modify its final judgments after the Term at which they were rendered, and this authority can neither be conferred upon nor withheld from the courts of the United States by the statutes of a State or the practice of its courts." *Bronson* v. *Schulten*, 104 U. S. 410 (1881).

In practice, observance of the rule that the lapse of the term destroyed the power of the court to act worked many inequities. The rule, from a view point of abstract justice, was theoretically unsound as the period of time prior to the expiration of the term would vary in different cases even though exactly the same judgment was entered. The *time* of the entry of the judgment, with respect to the end of the term, took on an importance entirely irrespective of right of justice. Examples of such unequal operation of the rule may be found in the decided cases. Thus, where the term had expired it was held in a leading case that the trial judge had no power to settle a bill of exceptions even though counsel expressly stipulated with reference to such a contingency. (*Exporters* v. *Butterworth-Judson Co.*, 258 U. S. 365 (1922).) The Supreme Court gave as the basis of its ruling that the matter was jurisdictional and that consent of the parties could not give jur-

Having thus stated the question, the Court answered that question in the following language at pp. 678 and 679:

"• • • We feel at liberty, therefore, to follow our own convictions as to the power of the courts of the District over their judgments; and are of opinion, and so decide, that, **after the term at which they were rendered,** the power of the court over the parties and over its record remains only in the excepted cases already noticed, when, on motion, it may be purged of clerical errors, or the judgment reversed by proceedings for

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isdiction to courts of the United States. So, too, the courts have held that even though a judgment is erroneous, they are powerless to remedy it after the term has expired. (*Wetmore* v. *Karrick,* 205 U. S. 141.) Similarly, due to the lapse of the term, the court cannot set aside a judgment on the ground of newly discovered evidence (*Realty Acceptance Corp.* v. *Montgomery,* 284 U. S. 547 (1932) or because the judgment was obtained by perjury (*Delaware L. & W. R. R. Co.* v. *Rellstab,* 276 U.. S. 1 (1928)), or because of the misconduct of the district attorney and the concealed bias of a juror. (*U. S.* v. *Mayer,* 235 U. S. 55.)

Sec. 19373. Rule to be Read in Connection with other Rules.

Sec. 19374.—New Trial.

Rule 6 (c) providing that the expiration of the term in no with Rule 59 relating to new trials. Under the latter rule, a way affects the power of the court must be read in connection motion for a new trial must be served not later than ten days after entry of judgment except that a motion for a new trial on the ground of newly discovered evidence may be made prior to the expiration of the time for appeal, usually three months. It follows from Rule 59 that even though the court has power under Rule 6 (c) to grant a new trial after the expiration of the term, such power is controlled within the limits of Rule 59 above-quoted. So, too, under Rule 59 (d) a court cannot of its own initiative grant a new trial later than ten days after the entry of judgment.

Sec. 19375.—Clerical Mistakes.

Rule 60 (a) provides that clerical mistakes in judgments and orders may be corrected by the court at any time. This is in accordance with the provision of Rule 6 (c) that the lapse of the term does not affect the power of the court over the judgment. It is simply expressive of the rule existing prior

errors in fact, in analogy to the practice in cases of writs of error *coram vobis*, unless it is invoked by a formal bill in equity upon grounds recognized as furnishing a title to relief. We are, therefore, of opinion that the Supreme Court of the District, both at special and general term, in entertaining and granting the motion to set aside the judgment in the present case, committed error, and the proceedings and judgment thereon are

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to the adoption of the present rules, under which courts for a long period of time have exercised the power to correct clerical mistakes even though the term had expired.

Sec. 19376—Mistakes, Inadvertence, Surprise, Excusable Neglect.

While under Rule 6 (c) the expiration of the term in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it, the right of the court to relieve a party from a judgment obtained through mistake, inadvertence, surprise or excusable neglect is controlled by Rule 60 (b) requiring a motion for that purpose to be filed not later than six months after the judgment was taken.

Sec. 19377.—Fraud.

Rule 6 (c) should not be interpreted to confer any new carte blanche power upon a court to set aside a judgment for fraud after the term has expired. Cases of this character are covered by Rule 60 (b). The six months time limitation in Rule 60 (b) relating to mistake, inadvertence, etc. does not apply, it is true, to cases of fraud, as the rule provides: "This rule does not limit the power of the court (1) to entertain an action to relieve a party from a judgment, order, or proceeding. * * *"

However, inasmuch as, under the Empowering Act, the present rules cannot alter the jurisdiction of the Federal Courts or the substantive rights of any litigant, the power of the court to set aside a judgment for fraud is the same today as prior to the promulgation of the present rules. Hence the provision of Rule 6 (c) that the expiration of the term does not affect the power of the court cannot be interpreted to enlarge the power of the Federal Courts to set aside a judgment obtained by fraud. Such power may be invoked by an original bill to impeach a judgment for fraud.

Sec. 19378. Right to Repose of Litigation.

Reversed, and the cause remanded, with directions to dismiss the motion of the defendant, but without prejudice to his right to file a bill in equity." (Emphasis supplied.)

The Supreme Court of the United States adhered to the distinction between the nonappealability of orders vacating judgments rendered at the same term at which the judgment was pronounced and the appealability of such orders when the judgment vacated was entered at a prior term in

Hume v. Bowie, 148 U. S. 245.

In the *Hume* case, a disappointed litigant sought to appeal from an order vacating a judgment rendered at the same term at which the order of vacation was entered.

The disappointed plaintiff in error relied upon *Phillips* v. *Negley*, 117 U. S. 665.

The provision of Rule 6 (c) that the expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it cannot, obviously, be interpreted in such a way as to destroy the quietus of litigation, which is the result of a final judgment unappealed from. In this respect, a judgment obtained under the present rules will be equally final and conclusive and will confer equal repose with a judgment obtained under the former practice. Judgments unappealed from normally terminate litigation and while there are exceptions, some of which have been adverted to in the previous sections, the present Rule 6 (c) must not be interpreted to impinge upon this fundamental principle. *The provisions of the basic act, disclaiming any power to alter the jurisdiction of the Federal Courts or substantive rights involved in the law of real property, patents, lis pendens, etc. The object of the present rule was simply to destroy the artificial limitations inherent in the theory of judicial power as bound up in the term of court. they show no intention to go further and affect in any way the right of repose resulting from a final judgment and the termination of the proceedings.*

Judge Learned Hand thus expounded the rule of the *Hume* and *Stevirmack Oil & Gas Co.* cases in:

Board of Supervisors v. Knickerbocker Ice Co., 80 F. (2d) 248.

In the *Knickerbocker* case Judge Learned Hand said at page 250:

> "In *Zadig* v. *Aetna Ins. Co.*, 42 F. (2d) 142, we took jurisdiction over the appeal only because the court, by refusing to reopen the judgment, had finally disposed of the cause; for an order vacating a judgment and setting down the cause for trial is interlocutory and not appealable. *O'Brien* v. *Lashar*, 226 F. 215 (C.C.A. 2); *Mitchell* v. *Mason*, 4 F. (2d) 705 (C.C.A. 5). *Phillips* v. *Negley*, 117 U. S. 665, 6 S. Ct. 901, 29 L. Ed. 1013, *established an exception to this when the term had expired, on the ground that in that case the motion was a 'new proceeding,' and the order concluded it, even though its content was interlocutory, viewed from its effect in the main cause.* Thus, as the court said, appellate jurisdiction depended upon whether the District Court had itself had jurisdiction over the judgment. The same result was reached in *City of Manning* v. *German Ins. Co.*, 107 F. 52 (C.C.A. 2), *S. M. Hamilton Coal Co.* v. *Watts*, 232 F. 832 (C.C.A. 2), and *Greyerbiehl* v. *Hughes Electric Co.*, 294 F. 802, 804 (C.C.A. 88), by saying that one may always appeal upon the question whether the District Court had jurisdiction over its judgment. *Smith* v. *United States ex rel. Gorlo* (C.C.A. 7), 52 F. (2d) 848 (semble). In *Stevirmac Oil & Gas Co.* v. *Dittman*, 245 U. S. 210, 38 S. Ct. 116, 62 L. Ed. 248, the District Court had refused to vacate a default judgment entered eighteen months before the defendant moved. *While it does not expressly appear that this had been after the expiration of the term, that was undoubtedly the case, and the motion was a 'new proceeding,' so that even an order vacating the judgment would have been appealable to*

this court. This is probably what Day, J., meant when he said (245 U. S. 210, page 216, 38 S. Ct. 116, 62 L. Ed. 248), that the judgment was final because the proceeding was 'in effect an independent action,' though the decision went off on a point of jurisdiction peculiar to the Supreme Court and does not concern us. Thus the first question here is whether the judge had jurisdiction over the dismissal, for if he had, we cannot entertain the appeal." (Emphasis supplied.)

The difference between the nonappealability of orders vacating prior judgments "in the same proceeding," which orders are not reviewable until the merits of the case have been tried, and the appealability of orders entered in "separate [that is, subsequent] proceedings" has been noted by this court *per* Evans, J. in

Glinski v. United States, 93 F. (2d) 418.

In the *Glinski* case this court said at page 420:

"Our conclusion is that if 'the proceeding to vacate the judgment is in effect a separate proceeding,' the order entered therein refusing to vacate the judgment is final and reviewable. *Stevirmac Oil & Gas Co.* v. *Dittman, supra.*"

In the *Glinski* case, 93 F. (2d) 418, Judge Evans said at pages 419 and 420:

"An order denying a motion to vacate a judgment is likewise not ordinarily appealable. *Smith* v. *U. S. ex rel. Gorlo* (C.C.A.), 52 F. (2d) 848; 2 Am. Juris., page 904; *Republic Supply Co.* v. *Richfield Oil Co.* (C.C.A.), 74 F. (2d) 907, 909; *Phillips* v. *Negley*, 117 U. S. 665, 6 S. Ct. 901, 29 L. Ed. 1013; *Baker* v. *White*, 92 U. S. 176, 23 L. Ed. 480, 4 *Corpus Juris Secundum, page* 265, Appeal and Error.

"*The rule, however, is subject to what might be called an exception. Stevirmac Oil & Gas Co.* v. *Dittman*, 245

U. S. 210, 38 S. Ct. 116, 62 L. Ed. 248." (Emphasis supplied.)

This Court, again speaking through Evans, J. (Alschuler and Sparks, JJ. concurring), again noted the distinction between the *nonappealability* of orders vacating a judgment or decree pronounced at *the same term* at which the order of vacation is rendered and the *appealability* of orders vacating judgments pronounced *at a term prior* to the term at which the order of vacation is rendered. The distinction is explicitly stated in

Smith v. Gorlo, 52 F. (2d) 848.

In the *Smith* case the Court entered an order vacating a judgment pronounced at the same term at which the order of vacation was entered.

This Court held that the order vacating the judgment was not appealable *because it was entered at the same term at which the decree it vacated was entered.*

But the Court was careful to say at page 848:

> "While it is true that cases may be found which hold that an order vacating (or refusing to vacate) a judgment or decree is appealable [*Stevirmac Oil & Gas Co* v. *Dittman*, 245 U. S. 210, 38 S. Ct. 116, 62 L. Ed. 248; *Zadig* v. *Aetna Ins. Co.*, 42 F. (2d) 142 (C.C.A. 2); *Phillips* v. *Negley*, 117 U. S. 665, 6 S. Ct. 901, 29 L. Ed. 1013; *Hume* v. *Bowie*, 148 U. S. 245, 13 S. Ct. 582, 37 L. Ed. 438], an examination of the facts of each case discloses a situation *where the order appealed from vacated a previous decree or judgment at a term subsequent to the one at which it was entered, and when the court had lost jurisdiction of the cause. In these instances, the motion to vacate and the order granting the same are treated as a new and independent suit, and the final order granting the same is held to be appealable.*" (Emphasis supplied.)

The passage from Judge Evans' opinion above quoted cites

Phillips v. Negley, 117 U. S. 665.

In the *Phillips* case, the lower court entered a judgment and then vacated that judgment *at a subsequent term.*

This Court, holding *per* Mr. Justice Matthews that the order vacating the judgment was appealable *because the judgment vacated was entered at a prior term* although it would not have been appealable if it had been entered at the same term, said at page 671:

> "• • • The vacating of a judgment and granting a new trial, in the exercise of an acknowledged jurisdiction, leaves no judgment in force to be reviewed. If, on the other hand, the order made was made without jurisdiction on the part of the court making it, then it is a proceeding which must be the subject of review by an appellate court."

Having thus stated the question this Court answered that question in the following language at pp. 678 and 679:

> "• • • We feel at liberty, therefore, to follow our own convictions as to the power of the courts of the District over their judgments; and are of opinion, and so decide, that **after the term at which they were rendered,** the power of the court over the parties and over its record remains only in the excepted case already noticed, when, on motion, it may be purged of clerical errors, or the judgment reversed by proceedings for errors in fact, in analogy to the practice in cases of writs of error *coram vobis,* unless it is invoked by a formal bill in equity upon grounds recognized as furnishing a title to relief. We are, therefore, of opinion that the Supreme Court of the District, both at special and general term, in entertaining and granting the motion to set aside the judgment in the present case, committed error, and the proceedings and judgment thereon are

Reversed, and the cause remanded, with directions to dismiss the motion of the defendant, but without prejudice to his right to file a bill in equity." (Emphasis supplied.)

This Court adhered to the distinction between the nonappealability of orders vacating judgments rendered at the same term at which the judgment was pronounced and the appealability of such orders when the judgment vacated was entered at a prior term in *Hume* v. *Bowie*, 148 U. S. 245.

It is therefore submitted that the Court of Appeals erred in holding that the district court's reinstatement of this case on a motion made more than 10 days after the entry of the judgment of dismissal and that court's subsequent order refusing to vacate that order of reinstatement were final and were appealable.

III.

THE DISTRICT COURT LACKED JURISDICTION TO VACATE THE JUDGMENT OF DEFAULT AND REINSTATE THIS CAUSE ON A MOTION MADE MORE THAN 10 DAYS AFTER THE ENTRY THEREOF, THERE BEING NO SHOWING OF ANY REASON WHY THAT MOTION COULD NOT HAVE BEEN MADE WITHIN THE 10 DAYS FIXED BY FEDERAL RULE OF CIVIL PROCEDURE 59.

Federal Rule of Civil Procedure 59, set forth in full in this brief, *ante*, at pages 15 and 16, provides in Paragraph (e) thereof as follows:

"(e) Motion to alter or Amend a Judgment. A motion to alter or amend the judgment shall be served **not later than 10 days after entry of the judgment.**"

This provision is concordance with and supplements Paragraph (b) of the same Rule 59, which paragraph (b) is as follows:

"(b) Time for Motion. A motion for a new trial shall be served **not later than 10 days after the entry of the judgment.**"

To be sure, Rule 60 (b) does provide in full as follows:

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1), mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 50 (b); (3) fraud whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., sec. 1655, or to set aside a judgment for fraud upon the court. Writs of *coram nobis, coram vobis, audita querela,* and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for containing any relief

from a judgment shall be by motion as prescribed in these rules or by an independent action."

But it is obvious from the architecture of the rules and made clear beyond peradventure by the decisions of the Seventh Circuit that a motion under Rule 60 (b) can not be used as a belated substitute for a motion for a new trial under Rule 59 (b), which must be made "not later than 10 days after the entry of the judgment" or as a tardy alternative to a "motion to alter or amend the judgment", which "shall be served not later than 10 days after the entry of the judgment."

Were this not the rule, the ten-day limitation, twice uttered in Rule 59, once in Subparagraph (e) of that Rule, would be absolutely meaningless. There would be no reason why a litigant who failed to make a timely motion "to alter or amend a judgment" or "for a new trial," could not merely file an untimely motion, involving Rule 60 (b) instead of Rule 59.

There is no doubt about this.

This court has so held twice in cases that called for equitable considerations far more strongly than does the record in the instant case.

So far as we can ascertain, the latest pronouncement on the question, very precisely in point, is

Nugent v. Yellow Cab Co., 295 F. 2d 713.
Adv. Sheet No. 7.

In the *Nugent* case, Hastings, C.J. and Schnackenberg and Castle, JJs sitting, the facts were thus stated in the opinion by Judge Hastings (at p. 795):

"This is a diversity action brought by plaintiff Margaret Nugent (appellant) to recover damages for injuries sustained by her on March 19, 1958 while she

was riding as a passenger in a taxicab owned and operated by defendant Yellow Cab Company (appellee).

Following a trial by jury, a verdict was returned finding the issues in favor of plaintiff and assessing her damages at $12,500. Judgment on the verdict was entered April 21, 1960.

On April 28, 1960, plaintiff moved the trial court to extend the time for the filing of a motion for new trial to May 31, 1960. One of defendant's attorneys was present in court and stated that he had no objection to plaintiff's request and the motion was granted.

On May 31, 1960, plaintiff filed a second motion for an extension of time to file her motion for new trial and the motion was granted, without objection.

On June 14, 1960 and July 14, 1960, plaintiff's third and fourth motions for similar extensions of time to file her motion for a new trial was granted, without objection. The latter extension was to and including September 20, 1960.

The reason assigned for each of the four extensions of time was that the official court reporter has not yet prepared the trial transcript.

On September 20, 1960, plaintiff filed her fifth motion for an extension of time for the filing of a motion for new trial to which defendant objected in open court. Thereupon, on the same date and within the time previously allowed by the trial court, plaintiff filed her post-trial motions for judgment notwithstanding the verdict for a new trial.

Thereafter, defendant moved to strike plaintiff's post-trial motions on the ground that they were not filed within 10 days after the verdict was received and judgment entered thereon as required by Rules 50(b) and 59(b), (d) and (e) of the Federal Rules of Civil Procedure, 28 U. S. C. A., and on the further ground that the trial court was without authority to extend the time for taking action under Rule 59(b) because of the prohibition set out in Rule 60(b).

Plaintiff then filed her answer to defendant's motion to strike her post-trial motions and an alternative petition for relief under Rule 60(b).

Continuing, Judge Hastings said (at p. 796):

"The ground asserted by plaintiff in her alternative petition for relief under Rule 60(b) was that:

"3. *Plaintiff's counsel*, through mistake or inadvertence, *overlooked and were not aware of that portion of Rule 6* of the Federal Rules of Civil Procedure which provides that the Court may not extend the time for taking any action under Rule 59 (b) except to the extent and under the conditions stated in that Rule. * * *" (Emphasis added.)

Judge Hastings thus concludes his opinion:

"Plaintiff's counsel, with commendable candor, concede that our recent holding in *Hudson* v. *Atchison, T. & S. F. Ry. Co.*, 7 Cir., 1961, 289 F. 2d 726, *certiorari* denied, October 9, 1961, 62 S. Ct. 61, is dispositive of this appeal. They contend, however, that our holding in *Hudson* is incorrect and argue for a reversal of it.

[1-4] On the facts, the procedural situation in *Hudson* is almost identical with the case at bar. There we considered at some length the rules under scrutiny here and the authorities bearing upon them. In *Hudson*, we expressly held:

(1) That Rule 50(b) forbids the entry of a judgment n.o.v. on a motion not filed within 10 days after reception of the verdict.

(2) That Rule 59(b), (d) and (e) prohibits a trial court from granting a motion for a new trial made after the expiration of 10 days after entry of judgment.

(3) That, with certain exceptions having no application there, the 10 day period for filing a motion for new trial under Rule 59(b) cannot be enlarged by the trial court under Rule 6(b).

(4) That opposing counsel cannot waive the strict requirements of the rules fixing the time for filing post-trial motions by agreeing to such extensions of time.

(5) That, under the facts before us, ignorance of the rules resulting in an agreement for an unauthorized extension of time for filing post-trial motions does not furnish grounds for relief under Rule 60(b).

We have given careful consideration to plaintiff's contentions but feel compelled to adhere to our holding in *Hulson, supra*, for the reasons and under the authorities therein set out. These need not be restated here. They require an affirmance of the case now before us.

If the rules applicable to the case at bar are too strict or bring about an undesirably harsh result, they should be revised or amended as provided by law and not through the judicial process. We express no opinion here on the desirability of such changes. However, we do point out that the Federal Rules of Civil Procedure are now under study by appropriate committees, and counsel have an opportunity to present their views to such study groups.

The judgment and orders of the district court appealed from are

Affirmed."

It will be noted that this court's opinion in the *Nugent* case deals *both* with Federal Rules of Civil Procedure 59 *and* 60.

The *Nugent* case had far stronger appeal to equity than has this case; for in the *Nugent* case, the defendant stipulated to an extension of time within which to file a motion for a new trial.

Surely, if the ten-day period of limitation enacted by paragraphs (c) and (e) of Rule 59 did not mean what they say, and surely if Rule 60 (b) could be invoked as author-

izing a belated alternative to a motion under Rule 59, the result in the *Nugent* case would have been different.

The *Nugent* case (295 F. 2d 713) cites, approves and precisely follows the teachings of this court in

Hudson v. Atchison, T. & S. F. Ry. Co., 289 F. 2d 726.

In the *Hudson* case, the court similarly held that, absent some showing of exigent reason, a motion authorized by Rule 59 must be made within the 10-day period prescribed by that Rule and hold that the district court was without authority to grant relief from a judgment on a motion filed more than 10 days after judgment.

In this case there were no circumstances whatever showing "excusable neglect", "mistake" or "inadvertence."

On the extreme contrary, the belated petition to vacate contained the following sworn averment.

> AFFIDAVIT OF PLAINTIFF IN SUPPORT OF MOTION TO VACATE ORDER OF DISMISSAL ENTERED HEREIN TO-WIT ON DECEMBER 23, 1960.
>
> Lar Daly, being sworn upon oath deposes and says:
>
> 1. That at the time of the filing of the above captioned action he was gratuitously represented by legal counsel but due to circumstances beyond his control, he was unable to pay to them the agreed fees for their services.
>
> 2. That as a consequence, it was agreed between Plaintiff and his said counsel that they should not formally withdraw their appearances, but that he would not expect them to render further services in this cause or to watch the calendar of Court cases for him but that he would attempt so to do as his counsel, *Pro Se*.
>
> 3. That he apparently was not very diligent in his efforts to watch the calendars of the six cases now pend-

ing in the Courts of Illinois and not being a member of the bar he does not subscribe or have available to him regularly, a copy of the Daily Law Bulletin which lists the call of cases in this and other courts, and as a result he did not notice that this cause was on the call of the Honorable Edwin A. Robson until after it had been dismissed.

4. That the first notice he received was on the 27th day of December 1960 when the notice from the office of the Clerk of this Court addressed to Falkenberg and Falkenberg was received by him from such persons and informing him of the dismissal of this cause on December 23, 1960.

5. That on December 28, 1960, he telephoned the office of the Court's Clerk and was advised to prepare and file an affidavit stating the facts herein, preparatory to filing of his Motion to vacate the Court's Order of December 23, 1960.

6. That he has now made arrangements for fees with said Falkenberg and Falkenberg and they have agreed to represent him in all further proceedings in this cause and he accordingly respectfully requests this Court to consider the facts as above set forth a justification for his inadvertance in overlooking the notice of the call of his cause on the calendar for report on December 23, 1960 and that it will reinstate this cause and set it down for hearing at a date convenient to the Court and counsel for the respective parties.

LAR DALY,

Plaintiff.

Subscribed and sworn to before me a Notary Public, in and for the County of Cook this 16th day of January, 1961.

CHARLES V. FALKENBERG,

(SEAL) *Notary Public.*

(Tr. pp. 34, 35.)

What does appear is that the plaintiff, having aspired to nomination by the Republican Party for the office of United States Senator and having suffered rejection of his nominating papers, recklessly sued Grenville Beardsley, charging that Beardsley had willfully and corruptly abused the office of Attorney General of Illinois and his prerogatives as ex-officio to that office as a member of the State Primary Canvassing Board when Attorney General Beardsley, now dead, did not even sit as a member of that board, and joined the other original defendants in that suit.

The plaintiff sought and the district court granted leave not only to vacate its final judgment of dismissal of December 22, 1960, but permitted that suit to be extended to include C. Arthur Nebel, an Assistant Attorney General.

Indeed, Rule 60 (b) speaks clearly as to the meaning of Rule 59 in the language in which it declares that "a motion under this Subdivision (b) does not affect *finality* of a judgment or suspend its operation." (Emphasis supplied.)

The judgment of dismissal became "final" 10 days after its entry, or on January 11, 1961.

In short, this court must either hold that the 10-day limitation period, twice prescribed by Rule 59, means nothing (save as a slight and very mild guide to a district judge's discretion) or that the district court lacked authority to reinstate this case on a motion made more than 10 days after the judgment was entered.

Conclusion.

For reasons apparent upon the record and urged in this petition, it is respectfully submitted that this case should evoke *certiorari* to review and reversal of the judgment of the Court of Appeals in this case.

Respectfully submitted,

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APPENDIX I.

304 F. 2d. 666.

No. 13595 SEPTEMBER TERM, 1961 APRIL SESSION, 1962

Lar (America First) Daly, *Plaintiff-Appellee,* v. William G. Stratton, Charles F. Carpentier, Elbert S. Smith, Joseph D. Lohman and C. Arthur Nebel, substituted for Grenville Beardsley, Deceased, *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 12, 1962

Before DUFFY, SCHNACKENBERG, *and* KILEY, *Circuit Judges.*

KILEY, *Circuit Judge.* This is an appeal by defendants from an order denying their motion to vacate an order setting aside an ex parte judgment of dismissal of plaintiff's damage suit under the "civil rights and elective franchise" provision[1] of the Judicial Code.

Plaintiff, a resident of Illinois, brought suit May 19, 1960, against defendants, as members of the Illinois State Electoral Board, on their alleged refusal to perform their statutory duty to certify him as a Republican candidate for

1. 28 U. S. C. §1343.

the office of United States Senator from Illinois. Plaintiff prayed for $135,150 actual, and $5,000,000 exemplary, damages.

A motion to dismiss, with supporting brief, was filed by defendants for want of jurisdiction and for failure to state a claim upon which relief could be granted.[2] While the motion was pending, the cause was called "for report on status" by the District Court, and on plaintiff's failure to respond, an order was entered dismissing the cause December 22, 1960 for want of prosecution.[3]

January 20, 1961 plaintiff filed a motion, with supporting affidavit, to set aside the judgment of dismissal, and on January 27, 1961 an order was entered allowing plaintiff's motion. June 15, 1961 defendants filed a motion to vacate the order of January 27, on the ground that that order was entered more than ten days after the dismissal judgment, in violation of Fed. R. Civ. P. 59 and 60; that there was no showing that plaintiff was prevented from presenting his motion within ten days; and that therefore the court lacked jurisdiction to vacate its judgment of dismissal on December 22, 1960. November 8, 1961 the District Court denied defendants' motion and ordered them to answer the complaint. Defendants appeal from that order.

The question is whether the order of November 8, 1961 denying defendants' motion to vacate the order setting aside the dismissal judgment is final and appealable.

Prior to the adoption of the Federal Rules of Civil Procedure, an order vacating a judgment and setting a cause for trial was interlocutory in character and not appealable if the vacation order was entered at the same term of court during which the original judgment was entered.[4]

---

2. June 6, 1961 the District Court denied defendants' motion to dismiss the original complaint.

3. U. S. Dist. Ct. N. D. Ill., Rule 21.

4. Since the advent of Fed. R. Civ. P. 6(c), expiration of "term time" does not affect proceedings instituted within the time prescribed therefor by other rules.

Board of Sup'rs v. *Knickerbocker Ice Co.*, 2 Cir., 80 F. 2d 248 (1935). However, if the motion to vacate was made after "term time" it was in the nature of a new proceeding which the entering of the order, on the motion would conclude, making it appealable. *Id.* In *Phillips* v. *Negley*, 117 U. S. 665 (1886), it was stated that the vacation of a judgment in the exercise of "acknowledged jurisdiction" would leave no judgment effective for purposes of review. But if the judgment is vacated where the court making it is without jurisdiction so to do, then an appealable issue is presented. In light of these rules it was said that appellate jurisdiction depends on whether the District Court itself had jurisdiction in issuing the vacation order. *Board of Sup'rs* v. *Knickerbocker Ice Co.*, 2 Cir., 80 F. 2d 248 (1935).

Defendants' arguments in support of their theory of appealability assume that Fed. R. Civ. P. 59 and 60 were applicable in the case at bar to require that a motion to vacate the order of dismissal must be made within ten days thereof "unless some exceptional circumstances are shown," citing *Nugent* v. *Yellow Cab Co.*, 7 Cir., 295 F. 2d 794 (1961) and *Hudson* v. *Atchison, T. & S. F. Ry. Co.*, 7 Cir., 289 F. 2d 726 (1961), and that this limitation period takes the place of "term time" in the Federal Courts. However, both of those cases involved motions for new trial, which are governed by specific time limitations, Fed. R. Civ. P. 50(b) and 59(b), and are therefore distinguishable from the case at bar.

The present case involves the question of relief from an involuntary dismissal, by the court, *Darlington* v. *Studebaker-Packard Corp.*, 7 Cir., 261 F. 2d 903, cert. denied 359 U. S. 992 (1959), under Fed. R. Civ. P. 41(b) and District Court Rule 21. Appellee's affidavit in support of his motion to vacate the judgment of dismissal stated that his failure to respond was due to financial difficulty in the procurement of counsel and that, not being an attorney, he did not have regular access to the Daily Law Bulletin in which the call of cases was published. Fed. R. Civ. P. 60 (b) provides that the court may relieve a party from a

final judgment or order[5] for "* * * (1) mistake, inadvertence, surprise, or excusable neglect" and that the motion shall be made "within a reasonable time and * * * not more than one year after the judgment, order or proceeding was entered or taken." Accordingly, this rule governs the timeliness of the motion to vacate. 7 Moore, *Federal Practice*, ¶¶60.22(2), 60.27(2) (2d ed. 1953); *Dauphinee* v. *American Range Line*, 1 F. R. D. 437 (E. D. Pa. 1940).

We hold that the ten day limitation of Rule 59 does not apply; that there is no merit to the contention of defendants that the order of November 8, 1961 denying their motion to vacate the order setting aside the judgment of dismissal became appealable because based on a motion made after that "term" of ten days; that the District Court had jurisdiction to enter the order "not more than one year after" the judgment of dismissal; and that the order of November 8, 1961 is not final and appealable and this court is therefore without jurisdiction to entertain this appeal.[6] *Resnik* v. *La Paz Guest Ranch*, 9 Cir., 289 F. 2d 814, 817 (1961).

Appeal dismissed.

A true Copy:

....., *Clerk of the United States Court of Appeals for the Seventh Circuit.*

---

5. Fed. R. Civ. P. 41(b). * * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

6. The record shows that in defendants' motion to vacate the order of January 27, 1961, setting aside the dismissal, the date of that order is erroneously stated as June 6, 1961. This error was carried into the order, of November 8, 1961, appealed from. That order should be corrected (Fed. R. Civ. P. 60[a]) by substituting the date January 27 for June 6 in the first paragraph. That paragraph now reads:

> * *,* The Court being fully advised it is
>
> ORDERED that defendants' motion to vacate the Court's order and judgment heretofore entered on June 6, 1961, setting aside its judgment of December 22, 1960, dismissing this case for want of prosecution and with prejudice be and it hereby is denied * * *.

APPENDIX II.

IN THE UNITED STATES DISTRICT COURT.
* * (Caption—60 C 787) * *

MEMORANDUM ON DEFENDANTS' MOTION TO DISMISS.

Plaintiff filed his complaint against defendants, who are members of the Illinois State Electoral Board for Primary Elections, for $135,150 actual damages, and $5,000,000 exemplary damages. Jurisdiction is predicated on 28 U.S.C. § § 1331 and 1343. He alleges that he is a native-born Illinois citizen and resident, 58 years of age, and that he has on many occasions been a candidate for public office. He further alleges that he has never been convicted of any infamous crime and is otherwise qualified to hold the office of United States Senator from Illinois; that he entered the Republican Party Primary for nomination as United States Senator at the Primary Election to be held April 12, 1960; that on January 25, 1960, he filed his properly prepared petition, statement of Candidacy and Loyalty Oath, with the necessary minimum number of signers and all other statutory requirements, and that it was accepted for filing and receipted for by an official receipt from the Secretary of State; that the Electoral Board had the duty of certifying names on proper petitions, but on February 9, 1960, the defendants were derelict in their duty in failing to certify his name and persisted in the refusal despite repeated demands by him, and they gave him no notice or hearing; that the duty of certifying him by the Board is ministerial once it is accepted for filing; that he was the victim of a conspiracy by defendants to deny him his rightful place on the ticket; that he has no remedy in the courts of Illinois, and that he has exhausted all of his state remedies, including an appeal to the Supreme Court of Illinois; and that he expended uselessly substantial sums of money in preparing his petition and conducting a campaign.

Defendants have filed a motion to dismiss for want of jurisdiction and for failure to state claim upon which relief

may be granted. They point out the lack of diversity and they also contend that they exercise a quasi-judicial function and are therefore immune to suit under the Federal Civil Rights Act or any other Federal statute.

Despite the abundance of precedents in the various fields of civil rights causes, the demarcation of the guiding principles is not too apparent (*Hardwick Jr.* v. *Hurley*, No. 12958, 7th Cir. May 2, 1961), especially at this state of the proceedings, and it is for this reason that the Court concludes the motion to dismiss for failure to state a cause of action should be denied.

The closest case is *Snowden* v. *Hughes*, 321 U. S. 1 (1944), which was a suit by an Illinois citizen for damages for violation of his civil rights under the Fourteenth Amendment because he was not certified as a nominee for state representative. The Supreme Court held that the Fourteenth Amendment did not protect rights derived solely from the relationship of the citizen and his state established by state law. National citizenship alone is protected by the privileges and immunities clause. A mere violation of a state statute does not infringe the Federal Constitution. The Court held that for a violation of the equal protection clause of the Constitution there must have been a purposeful discrimination. The Court did go on to say, at page 11-12:

> "A construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored."

The recent case of *Monroe* v. *Pape*, No. 39, decided by the Supreme Court February 20, 1961, held that the civil rights statute (42 U. S. C. § 1983; Rev. Stats. § 1979) was meant to give a remedy to parties deprived of constitutional rights and the Court held the complaint there stated a cause of action against the policemen who arrested, searched and imprisoned petitioners on open charges and who were subsequently released with no charges preferred against them.

The Court of Appeals in the *Hardwick* case, *supra*, indicated that but for the *Pape* case, its decision in *Stift* v.

Lynch, 267 F. 2d 237 (7th Cir. 1959), would have permitted a dismissal. In the *Stift* case, the state's attorney and his assistants were held not liable in a civil rights damage suit because of their quasi-judicial status. The *Stift* case is cited by defendants as authority for the instant dismissal. However, the Court believes that the members of the Electoral Board are still another step removed from the cloak of judicial immunity.

While the mechanics of securing nominees for the Senate are formulated by the State and therefore conceivably under the *Snowden* v. *Hughes* doctrine, a state-granted right, enforceable by state judicial proceedings in which the Federal Government would grant no redress, the Supreme Court seemed to stress that its non-intervention was based on the fact that a state office was involved. Such is not true in this case. The privilege of voting for, or running of the United States would seem to be attributable to national citizenship, and therefore one protected by the grant of a civil action for its deprivation by a state official "under color of any statute. . . . of any State." (42 U. S. C. § 1983.)

Federal courts have long been loath to step into controversies involving political issues, despite indirect national ramifications (*Blackman* v. *Stone*, 17 F. Supp. 102 (D. C. Ill. 1938), three-judge case, decree vacated because moot in 300 U. S. 641; *Saunders* v. *Wilkins*, 152 F. 2d 234 (4th Cir. 1945); *Johnson* v. *Stevenson*, 170 F. 2d 108 (5th Cir. 1948)). In the last cited case, it was held the Federal district court was without jurisdiction of an injunction suit seeking to interfere in a primary for United States Senator in Texas based on illegal voting and returns.

However, there is a Federal statute, 28 U. S. C. § 1343, granting the district courts jurisdiction of any civil action to "recover damages . . . under any Act of Congress providing for the protection of civil rights, including the right to vote," or "to recover damages . . . because of the deprivation of any right or privilege of a citizen of the United States. . . ." It is therefore possible that the right of a person qualified to run for the United States Senate is a

"right or privilege of a citizen of the United States," the deprivation of which by a conspiracy is remediable in the Federal Court.

Diversity of citizenship is not required under this act (*Ortega* v. *Ragen*, 216 F. 2d 561 (7th Cir. 1954)). State remedies need not be exhausted (*Baron* v. *O'Sullivan*, 258 F. 2d 336 (3rd Cir. 1958)).

In *Colegrave* v. *Green*, 328 U. S. 549 (1946), there was a dismissal of a declaratory judgment suit seeking an injunction against state officers arranging for an election at which members of Congress were to be chosen, the suit being predicated on the alleged inequality of districts in respect to population. The issue was said to be one of peculiarly political nature and therefore not meet for judicial determination. The Court pointed out, however, that (p. 552):

> "This is not an action to recover for damage because of the discriminatory exclusion of a plaintiff from rights enjoyed by other citizens. The basis of the suit is not a private wrong, but a wrong suffered by Illinois as a polity." (Emphasis ours.)

It cited the case of *Nixon* v. *Herndon*, 273 U. S. 536 (1927), where it was held that an action for damages could be maintained against judges of election for unlawfully denying to a qualified voter the right to vote at a state primary election, and that the State of Texas, barring Negroes from participation in Democratic Party primary elections held in the State for the nomination of candidates for senator and representatives in Congress, violates the Fourteenth Amendment. In the *Nixon* v. *Herndon* case, the Court said (p. 540):

> "The objection that the subject matter of the suit is political is little more than a play upon words. Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, . . ." (Emphasis ours.)

In *United States* v. *Classics*, 313 U. S. 299 (1941), it was held that the right of the people to choose representatives in Congress is a right established and guaranteed by Article I, § 2 of the Constitution and hence is one secured by it to those citizens and inhabitants of the State who are entitled to exercise the right. The right to vote for a representative in Congress is a right "derived from the States," only in the sense that the states are authorized by the Constitution to legislate on the subject to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4. It further held that included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at congressional elections.

The Court also held that (pp. 299-300):

> "Since the constitutional command is without restriction or limitation, their right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of States. . . ."
>
> "[The] primary election which is a necessary step in the choice of candidates for election as Representatives in Congress, and which in the circumstances of the case controls that choice, is an election within the meaning of Art. I, § § 2 and 4 of the Constitution. . . ."

Again, the Court said (p. 315):

> "While in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states . . . this statement is true only in the sense that the states are authorized by the Constitution, to legislate on the subject as provided by § 2 of Art. 1, to the extent that Congress has not restricted state action by the exercise of its powers to regulate elections under § 4 and its more general power under Article I, § 8, clause 18 of the Constitution. . . ."

Therefore the Court is of the opinion at this time that the right which plaintiff alleges was violated to his damage was

a Federal right, the right to recover damages for the violation of which would would be remediable in the Federal court. The motion to dismiss is denied.

/s/ EDWIN A. ROBSON,
Judge.

June 6, 1961.

APPENDIX III.

"UNITED STATES COURT OF APPEALS
For the Seventh Circuit,
Chicago 10, Illinois.

Tuesday, June 12, 1962.

Before:

Hon. F. Ryan Duffy, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. Roger J. Kiley, Circuit Judge.

Lar (America First) Daly, *Plaintiff-Appellee,* v. William G. Stratton, Charles F. Carpentier, Elbert S. Smith, Joseph D. Lohman and C. Arthur Nebel, substituted for Grenville Beardsley, Deceased, *Defendants-Appellants.*	No. 13595 — Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

"This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the appeal from the order of said District Court entered herein on November 8, 1961, be and the same is hereby, DISMISSED, with costs, in accordance with the opinion of this Court filed this day."

Office-Supreme Court, U.S.
FILED
DEC 29 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1962.

NO. 478

WILLIAM G. STRATTON, CHARLES F. CARPENTIER, ELBERT S. SMITH, JOSEPH D. LOHMAN and C. ARTHUR NEBEL, substituted for GRENVILLE BEARDSLEY, deceased,

Petitioners,

vs.

LAR (AMERICA FIRST) DALY,

Respondent.

CERTIFICATE TO PETITION FOR REHEARING.

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 N. La Salle Street, Suite 900,
Chicago (1), Illinois, (FI 6-2000),
Counsel for Petitioners.

WILLIAM C. WINES,
RAYMOND S. SARNOW,
A. ZOLA GROVES,
EDWARD A. BERMAN,
Assistant Attorneys General,
Of Counsel.

Printed by Authority of the State of Illinois

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Petitioners,

vs.

LAR (AMERICA FIRST) DALY,

Respondent.

CERTIFICATE TO PETITION FOR REHEARING.

I, RAYMOND S. SARNOW, one of the attorneys for Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that the Petition for Rehearing heretofore filed herein is presented in good faith and not for the purposes of delay.

I further certify that on December 28, 1962 I served copies of this certificate as follows:

By mailing three copies of said certificate to

Lar Daly, 844 W. Vermont Ave., Chicago 43, Ill.

Howard Newcombe Morse, 5501 W. Washington Blvd., Chicago 44, Ill.

in duly addressed envelopes, first class, postage prepaid.

.....

RAYMOND S. SARNOW,

One of Attorneys for Petitioners.

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PETITIONERS' PETITION FOR REHEARING.

WILLIAM G. CLARK,
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Petitioners,

vs.

LAR (AMERICA FIRST) DALY,

Respondent.

PETITIONERS' PETITION FOR REHEARING.

Petitioners respectfully but earnestly ask this court to reconsider its order denying *certiorari* because, as briefly but we think clearly appears below, the question presented is one of far more than usual importance and the opinion of the Court of Appeals decides that question in a way that is contrary to the teachings of this and other courts' decisions upon the point.

I.

The order of the district court reinstating this case on a motion filed, not within 10 days under Federal Rule of Procedure 59, but after 10 days under Rule 60, was clearly appealable even though it did not dispose of the merits of the case.

As is demonsfrated in the petition for *certiorari* (Point II, pp. 11-23), the rule in the federal courts, as well as the practice at common law, in chancery, and in most other jurisdictions, has heretofore always been that an order vacating a judgment or decree *within term time* is not final and not appealable, no matter how clearly erroneous it may be; and can not be reviewed until the court has entered a judgment or decree that is final and appealable. *Hume* v. *Bowie*, 148 U. S. 245, discussed in the petition for *certiorari* at page 18, *Board of Supervisors* v. *Knickerbocker Ice Co.*, *per* Judge Learned Hand, 80 F. 2d 248, *Glinski* v. *United States*, 93 F. 2d 418, *Smith* v. *Gorlo*, 52 F. 2d 848, and other authorities cited in the petition (pp. 11-23).

But once term time has passed, an order vacating a judgment or decree so far disturbs rights that are so far vested that the order is appealable even though it does not dispose of the case on the merits.

All of the cases cited in the paragraph next above hold or recognize this to be the law.

The presently standing opinion of the court of appeals in this case makes it possible for a district court to enlarge the time for appeal from a judgment, not by entertaining a motion under Rule 59, but by entertaining such a motion *at any time* under Rule 60.

If this is to be a principle of Federal appellate judicature, this court should so declare. As matters stand now the opinion of the Court of Appeals for the Seventh Circuit in

this case is at war with the teachings of the cases cited above.

II.

This case is of far more than usual importance.

Applications for relief from judgments under Rule 60 are common and orders vacating judgments under Rule 60 are likewise rather frequent.

These orders disturb rights that are so far vested that they can only be overturned by the special showing required by Rule 60.

The decision of the Court of Appeals for the Seventh Circuit, which contradicts the teachings of the cases cited under Point I, *ante*, thus precipitates a conflict on the question whether such orders are appealable before the case has been retried or otherwise reconsidered and redetermined by the district court.

This Court should resolve this conflict and authoritatively decide this important question.

Prayer for Rehearing.

For these reasons petitioners respectfully ask this Court to grant a rehearing in this case.

Respectfully submitted,

WILLIAM G. CLARK,
Attorney General of the State of Illinois,
160 N. La Salle Street, Suite 900,
Chicago (1), Illinois, (FI 6-2000),
Counsel for Petitioners.

WILLIAM C. WINES,
RAYMOND S. SARNOW,
A. ZOLA GROVES,
EDWARD A. BERMAN,
Assistant Attorneys General,
Of Counsel.

Certificate of Service.

I, Raymond S. Sarnow, one of the attorneys for petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certifies that, on or before December 28, 1962, I served copies of the foregoing petition for rehearing or modification of this Court's opinion and judgment as follows:

By mailing three copies of said petition to

Lar Daly
844 W. Vermont Ave., Chicago 43, Ill.

Howard Newcombe Morse
5501 W. Washington Blvd., Chicago 44, Ill.

in duly addressed envelope, first class, postage prepaid.

.....

RAYMOND S. SARNOW,

One of Attorneys for Respondent.